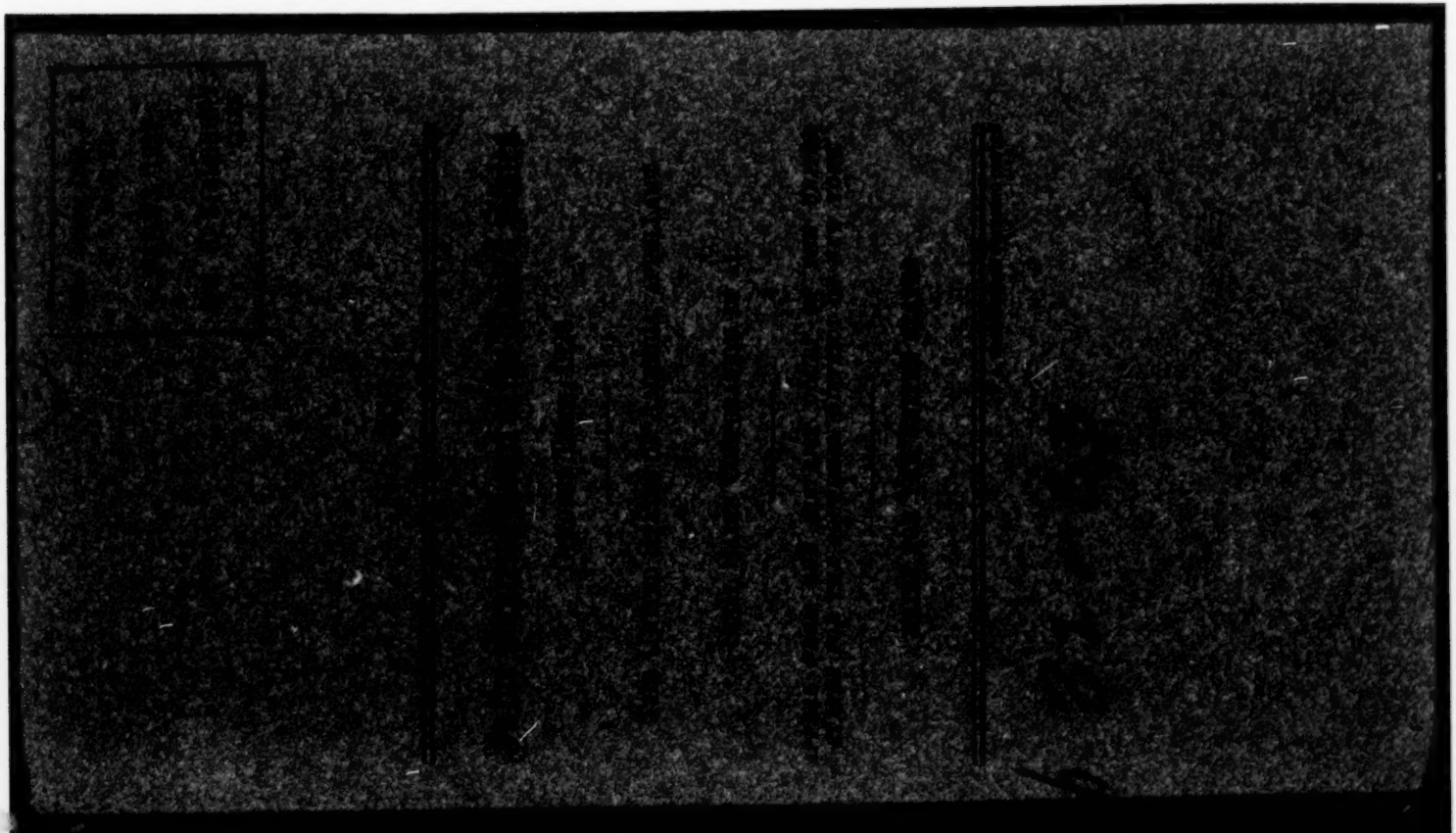

INDEX

	Page
Previous Opinion in the Present Case	1
Grounds of Jurisdiction	1
Question Presented	2
Statutes Involved	3
Statement of the Case	4
Defendants	6
The Petition	7
Assignments of Error	15
Summary of Argument	15
Argument:	
I. A conspiracy with intent to restrain and monopolize the importation into the United States of a staple product, carried into effect by overt acts committed both in the United States and abroad and having the intended effect of monopolizing and enhancing prices, is unlawful	17
II. The District Court erred in holding that a conspiracy whose intent is the unlawful one of effecting a restraint of trade and monopoly is rendered immune from suit on the ground that a particular one of the overt acts on which its success depends was lawful in itself	18
III. The *Banana Case* is not authority upon the present case. The cases which followed it establish the rule that even acts done abroad which are lawful there may be the basis of a suit if they are operative here and are unlawful under our law	22
IV. The Antitrust provisions of the Wilson Tariff Act are particularly directed against restraints upon foreign commerce by importers	29
V. Repeal by the State of Yucatan of the discriminatory legislation in favor of defendants' monopoly would not render the case moot	32

AUTHORITIES CITED

Cases:

American Banana Company v. *United Fruit Company*, 213 U. S. 347 — 16, 19, 20, 26, 27

Cunard S. S. Company v. *Mellon*, 262 U. S. 100 — 27

Grogan v. *Walker & Sons*, 259 U. S. 80 — 27

Nash v. *United States*, 229 U. S. 373 — 20

	Page
New York Central Railroad Company v. *Chisholm*, 268 U. S. 29	27
Ricaud v. *American Metal Company*, 246 U. S. 304	26
Sandberg v. *McDonald*, 248 U. S. 185	26
The Titanic, 233 U. S. 718	26
United States v. *American-Asiatic Steamship Company*, 242 U. S. 537	34
United States v. *American Tobacco Co.*, 221 U. S. 106	27
United States v. *Bowman*, 260 U. S. 94	25
United States v. *Hamburg-American Company*, 239 U. S. 466	34, 35
United States v. *Nord Deutscher Lloyd*, 223 U. S. 512	23
United States v. *Pacific & Arctic Co.*, 228 U. S. 87	24
United States v. *Trans-Missouri Freight Association*, 166 U. S. 290	34
United States v. *Twenty-Five Packages of Panama Hats*, 231 U. S. 358	25
31 Op. A. G. 545	30, 31
Statutes:	
Sherman Antitrust Act (Act of July 2, 1890, c. 647, 26 Stat. 209):	
Sec. 1	3, 29, 30
Sec. 2	3
Sec. 4	3
Sec. 7	20
Wilson Tariff Act (Act of August 27, 1894, c. 349, 28 Stat. 509, 570, as amended by the Act of February 12, 1913, c. 40, 37 Stat. 667):	
Sec. 73	3, 30
Sec. 74	4
Act of February 11, 1903, c. 544, 32 Stat. 823, as amended June 25, 1910, c. 428, 36 Stat. 854	2
Judicial Code, Sec. 238, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938	2

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 200

THE UNITED STATES OF AMERICA, APPELLANT

v.

SISAL SALES CORPORATION ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

PREVIOUS OPINION IN THE PRESENT CASE

The opinion of the court below appears on page 52 of the Record.

GROUNDS OF JURISDICTION

The final decree in the District Court, dismissing the Government's petition, was entered June 30, 1925. (R. 55.) On July 24, 1925, the Government petitioned for and was allowed an appeal to this Court (R. 57, 58) under authority of the Act of February 11, 1903, c. 544, 32 Stat. 823, as amended June 25, 1910, c. 428, 36 Stat. 854, commonly known

as the Expediting Act, left in force by section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

QUESTION PRESENTED

Whether it is a violation of the Sherman and Wilson Antitrust statutes for a group of bankers to conspire in this country to monopolize the importation of a basic product from a foreign country in which over 80 per cent of that product is produced, and to carry such conspiracy into effect and actually enhance prices, by the following means:

(*a*) Organizing and financing a corporation in the foreign country as an exclusive purchaser of the product, with power to fix the price and withhold the product at will from the market;

(*b*) Turning over to that corporation the existing stocks in the hands of the subsidiaries of the defendants, so as to form an exclusive pool;

(*c*) Obtaining for that corporation from a foreign local government a discriminatory tax effective to produce a monopoly;

(*d*) Organizing a single corporate selling agency in the United States, with power to fix prices and impose terms, such as—

(1) Requiring every American purchaser of the product to take a portion of the stored product together with the new product.

(2) Securing exclusive use of chief transportation facilities from Yucatan, point of almost sole production.

STATUTES INVOLVED

Sherman Antitrust Act (Act of July 2, 1890, c. 647, 26 Stat. 209):

> SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.
>
> SECTION 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * *

Wilson Tariff Act (Act of August 27, 1894, c. 349, 28 Stat. 509, 570, as amended by the Act of February 12, 1913, c. 40, 37 Stat. 667):

> SECTION 73. That every combination, conspiracy, trust, agreement, or contract is

hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. * * *

SECTION 74. That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. * * *

STATEMENT OF THE CASE

The case comes to this Court on appeal from an order of the District Court for the Southern District of New York dismissing the petition. This order was entered June 30, 1925.

The gist of the petition is the charge that in 1921 the defendants entered into a conspiracy in the United States to monopolize the importation and sale in the United States of sisal—a fiber obtained from the henequen plant and used in the manufacture of binder twine.

A specific intent to increase prices in this country is charged.

The plan is alleged to have been based upon a similar plan, to which certain of the defendants were parties, in operation and effect a few years before, and which had been abandoned only after the institution of antitrust proceedings.

The means alleged were the formation of two corporations, one in Mexico (Comision Exportadora de Yucatan) for purchasing—the other in the United States (Sisal Sales Corporation) for selling.

In order to make the plan effective, it was alleged that the defendant banks would turn over to the purchasing corporation all stocks of sisal in the possession or under the control of the defendants, and that the defendants by the manipulation and reduction of prices would frighten the state government of Yucatan into enacting discriminatory legislation for the protection of the monopoly in sisal obtained by the defendants.

The petition charged the actual execution and operation of the plan at the date of the filing of the petition (R. 21) and a specific increase of prices resulting from the arrangement. The District

Court dismissed the petition upon the grounds that the basis of the suit by the Government was an agreement to obtain monopolistic legislation in another country, and the claimed unlawfulness of such acts.

The court below said (R. 54):

> An injunction to restrain dealings with the Comision Exportadora de Yucatan and the Sisal Sales Corporation would be quite futile, so far as the public interest is concerned. Anyone else could surely deal with them and the successors to the alleged unlawful conspirators would have to be at once treated as legitimate traders and go scatheless.

DEFENDANTS

The defendants in large part are citizens and corporations of and doing business in the United States.

The corporate defendants are the following:

(*a*) The Sisal Sales Corporation, a Delaware corporation engaged in the importation and sale of sisal, and having an office in New York City (hereinafter called the Sisal Corporation).

(*b*) The Equitable Trust Company, a New York banking corporation.

(*c*) Interstate Trust & Banking Company, a Louisiana banking corporation doing business in the city of New Orleans.

(*d*) The Eric Corporation, a Delaware corporation engaged in the importation of sisal from Mexico, and its sale in the United States. It

obtained its name from the first letters of each of four banks in the United States (E—Equitable Trust Company of New York, r—Royal Bank of Canada, i—Interstate Trust & Banking Company, c—Continental & Commercial National Bank of Chicago) and was organized as a selling agency by these banks to take over the sisal held by them as security for unpaid loans.

(*e*) Comision Exportadora de Yucatan, a Mexican corporation doing business in the state of Yucatan and exporting sisal to the United States (hereinafter called the Yucatan Company).

(*f*) The Royal Bank of Canada, a Canadian bank doing a banking business in the city of New York.

(*g*) Hanson and Orth, a partnership composed of defendants Charles D. Orth, Michael J. Smith, and Charles D. Orth, Jr., engaged in the sisal brokerage business in New York City and acting as general managers of the Sisal Sales and Eric Corporation.

The other individual defendants are officers or representatives of the above-named corporations. (R. 1, 2.)

THE PETITION

The petition alleges the following:

That for a period of twenty years or more Mexican sisal has been able to fill the requirements of the binder twine manufacturers in the United States. That Mexico is the only country in which sisal is produced in sufficient quantities to supply

the needs of this country and practically the entire output of that country is grown in the state of Yucatan, there being a small quantity produced in the state of Campeche. More than 80 per cent of the binder twine used in the United States is made of sisal. There is no efficient substitute for binder twine in the operation of the grain harvesting machinery, and without it the successful harvest of cereal crops on the present scale of production would be impossible. (R. 3, 4.)

Prior to 1915 sisal was sold to manufacturers of binder twine in the United States under conditions of competition. (R. 4.) In that year it was arranged that a corporation in Yucatan known as the Comision Reguladora would buy all Mexican sisal and import it into the United States, and under the direction of defendant Dinkins a company known as the Pan American Commission Corporation was organized in the United States, which had for its purpose the financing of the Reguladora Company and to carry out the purpose of withholding sisal from the United States market as long as necessary to enable it to be sold at increased prices. (R. 4, 5.)

As a result of the above arrangement the parties to the combination obtained a complete monopoly in the trade and commerce in sisal between the United States and Mexico and were able to fix arbitrarily the price of sisal in the United States. In 1917 an antitrust suit was instituted against this concern, but was dismissed because the Mexi-

can interests, no longer requiring the services of the Pan American Commission Corporation in the borrowing of money, repudiated the 1915 contract. (R. 7.)

Until August, 1919, the Comision Reguladora, practically the only distributor of Mexican sisal, frequently borrowed large sums of money from the banks in the United States, most of this money being furnished by the Equitable Trust Company of New York, the Royal Bank of Canada, and the Interstate Trust & Banking Corporation of New Orleans. As a result of its transactions with the banks there had been accumulated in the United States a surplus of about 400,000 bales of sisal, which was pledged to the banks. (R. 7, 8.) In the latter part of 1919 the price of sisal declined. The interested banks refused further advances and the Comision Reguladora then collapsed. The banks foreclosed on the sisal stored in the United States, and in order to dispose of it they organized the defendant Eric Corporation as a selling agency, which then became the dominant factor in Mexican sisal. (R. 8, 9.)

After the financial collapse of the Comision Reguladora in 1919 an open market prevailed in Yucatan, independent buyers were able to purchase fresh sisal as low as the Eric Corporation could afford to sell the sisal stored in the United States; fresh sisal was more in demand than the stored sisal; stored sisal was unfavorably regarded because of rumored deterioration. (R. 10.)

In January, 1921, in order to aid the defendant Eric Corporation in regulating its price of sisal, the Mexican Government was prevailed upon to impose a Federal export tax and thus insure the price of sisal. In addition, in the early part of that year the Comision Monetaria was organized, financed by the Eric Corporation and its affiliated banks, and set up in the sisal market in Yucatan in order to raise the price of sisal. (R. 10, 11.)

Despite these efforts the sisal market continued weak in the United States, and finally the interested banks refused to make further advances. The Comision Monetaria ceased purchasing sisal and was eliminated as a factor in the sisal market in July, 1921. The Mexican Federal export tax was repealed and there again came into existence an open market in Yucatan which continued until the establishment of the present alleged monopoly. (R. 11.)

In May, 1921, as a result of conferences held by certain of the defendants in New York City, the defendant Acevedo (attorney in fact for the defendant Comision Exportadora de Yucatan) proceeded to Yucatan. It was his mission to arrange with the Yucatan state government for the formation of a corporation under the control of that government which would have a monopoly of the purchase, sale, and export of sisal produced in that state. In the event of the successful outcome of his mission, it was agreed that the Eric Corpora-

tion would sell to the corporation thus formed all of its holdings of stored sisal at a fixed arbitrary price to be agreed upon. (R. 12, 13.) It was further understood that the proposed organization in Yucatan would enter into a contract with the selling agency to be established by the defendants in the United States, which would give such selling agency exclusive sale of all sisal produced by the Yucatan organization. As a result of the activities of Acevedo, on July 16, 1921, the state of Yucatan, by enactment of a statute canceled the charter of the Comision Reguladora del Mercado de Henequen, and organized a new corporation of the same name, the name afterwards being changed to Comision Exportadora de Yucatan. (R. 13.)

On September 12, 1921, the Eric Corporation entered into a contract with the firm of Hanson and Orth, by the terms of which this brokerage firm became the general managers of the business of the Eric Corporation in disposing of its sisal. (R. 14.) November 5, 1921, the Sisal Sales Corporation was organized, which soon took over all of the business and assets of the Eric Corporation, and this corporation retained the firm of Hanson and Orth in the same relation as had the Eric Corporation. (R. 14, 15.)

On December 22, 1921, a contract was entered into in the city of New York between the Sisal Sales Corporation and the Yucatan Company, providing for the designation of the Sisal Sales Corporation

as the general agent of the Yucatan Company, and as exclusive selling agent in connection with all sisal owned or controlled by the Yucatan Company, and giving to the Yucatan Company the right to draw upon the Sisal Corporation at sight for the payment of actual sales made by the Sisal Corporation for the account of the Yucatan Company. (R. 16, 17.)

On the same day that the formal contract was executed between the Yucatan Company and the Sisal Corporation, a letter signed by Acevedo as its attorney in fact was sent to the Eric Corporation by the Yucatan Company offering to purchase the entire stock of sisal owned by the Eric Corporation. By letter of the same date signed by the defendants Frederick T. Walker and F. W. Black, as vice presidents of the Eric Corporation, the offer was accepted. The sale of such sisal was consummated on February 21, 1922, at a fixed price of seven cents per pound. (R. 17, 18.)

On February 21, 1922, the Eric Corporation sold all of its other assets to the Sisal Corporation. In both of these transactions the purchasers gave promissory notes as full consideration, payable to the order of the Equitable Trust Company of New York. (R. 18.)

For various reasons, and particularly because of the fact that the old Comision Reguladora had been a defendant in a suit filed by the United States Government, it was considered expedient by the defendants to have the name of that company

changed, and this was accordingly done by the state of Yucatan pursuant to a decree issued January 2, 1922, changing the name to Comision Exportadora de Yucatan. (R. 18.)

On the same day the state of Yucatan enacted a law exempting all sisal sold to the Exportadora Company from the payment of a special state tax imposed by the law of December 13, 1921. Also, on the same day, the Yucatan Company began buying sisal from the Yucatan planters at four cents per pound, drawing on the Sisal Corporation. (R. 18.) In the meantime the Mexican Federal Government reduced the Federal surtax on all state taxes, thereby increasing the discriminatory tax in favor of the Yucatan Company, the result of which was to put independent buyers out of business, causing them to close their offices and to return to the United States, and effecting a complete monopoly in Mexican sisal. (R. 18, 19.)

In December, 1922 there were approximately 101,461 bales of stored sisal in the United States pledged to the Erie Corporation, which had been withdrawn from the market for more than one year. On December 22, 1922, an agreement was reached whereby the Yucatan Company purchased this sisal and pledged it to the Equitable Trust Company of New York for the purchase price, the payments of the loan to be made by the Sisal Corporation out of the funds obtained from the sales of sisal for the account of the Yucatan Company;

and as a part of such agreement the Mexican Federal Government was induced to suspend the imposition of the Federal export tax for the year 1923. (R. 19, 20.)

By contract dated May 12, 1923, between Sisal Corporation and New York and Cuba Mail Steamship Company, defendants secured exclusive use of the regular steamship transportation between the ports of this country and Yucatan, with the result and effect of excluding all others. (R. 20.)

It was then alleged that as a result of the various acts done pursuant to the original arrangement, the defendants enjoyed a complete monopoly of sisal. That the Yucatan Company, with the financial backing of the Sisal Corporation, became the sole purchaser of sisal from producers in Mexico; and that the Sisal Corporation became the sole importer and distributor of Mexican sisal in the United States. That binder twine manufacturers and brokers who formerly competed with one another for the purchase of sisal in Mexico and the United States were compelled to obtain all of their requirements from the Sisal Corporation; and that these defendants have established higher and unwarranted prices for sisal in the United States. (R. 21–23.)

ASSIGNMENTS OF ERROR

1. The District Court erred in holding that the petition herein fails to state a cause of action under Sections 1 and 2 of the Sherman Antitrust Law and Section 73 of the Wilson Tariff Law and in denying to the United States relief under Section 4 of the Sherman Antitrust Law and Section 74 of the Wilson Tariff Law.

2. The District Court erred in holding that the petition charged only an agreement to procure monopolistic legislation in another country, that acts permitted by the local law of Yucatan were the basis for the suit by the Government, that nothing remains of the conspiracy that does not depend upon the claimed unlawfulness of such acts, and that it would be futile so far as the public interest is concerned to enter an injunction to restrain dealings with the Comision Exportadora de Yucatan and the Sisal Sales Corporation.

SUMMARY OF ARGUMENT

The petition, in setting forth a conspiracy in the United States to restrain and monopolize foreign commerce in the importation of sisal into the United States, and to increase its market price in the United States, states a cause of action under the Sherman Antitrust Act and the antitrust provisions of the Wilson Tariff Act. This is strength-

ened by the presence of allegations that overt acts both in this country and abroad were planned and executed in furtherance of the conspiracy.

The conspiracy was not "dependent" upon the execution of any one overt act. The court below erred in inferring that the conspiracy was dependent upon the success of the conspirators in obtaining discriminatory legislation from the State of Yucatan, and that because such legislation was lawful the conspiracy must therefore be immune from attack.

The case of *American Banana Company* v. *United Fruit Company*, 213 U. S. 347, is not in point. That case held only that damages can not be predicated upon an act abroad if lawful where committed. Assuming that it held further that no suit can be predicated upon an act abroad if lawful where committed, it does not extend to an act which though committed abroad is operative in this country. Nor does it extend to a conspiracy in this country of which such act is only a single element, other constituent effective domestic acts being present.

Nor for the same reasons can the fact, if it be a fact, that discriminatory legislation in Yucatan has been repealed render this case moot.

ARGUMENT

I

A CONSPIRACY WITH INTENT TO RESTRAIN AND MONOPOLIZE THE IMPORTATION INTO THE UNITED STATES OF A STAPLE PRODUCT, CARRIED INTO EFFECT BY OVERT ACTS COMMITTED BOTH IN THE UNITED STATES AND ABROAD, AND HAVING THE INTENDED EFFECT OF MONOPOLIZING AND ENHANCING PRICES, IS UNLAWFUL

This case involves a combination to control the production, purchase, transportation, importation, and sale in the United States of sisal.

Defendant banks were left in 1919 with large stores of sisal upon which they had foreclosed. Instead of proceeding to dispose of their sisal in a free competitive market, they chose to pool their product and establish a monopoly in its sale. The plan of monopoly followed closely a similar plan which had been in operation at an earier period and to which some, but not all, of the present defendants were parties.

Over 80 per cent of sisal is produced in the States of Yucatan and Campeche in Mexico, and defendants are charged with conspiring to monopolize the importation of that product, and with carrying such conspiracy into effect and actually enhancing prices by means of—

> (*a*) Organizing and financing a corporation in the foreign country as an exclusive purchaser of the product, with power to fix the price and withhold the product at will from the market;

(*b*) Turning over to that corporation the existing stocks in the hands of the subsidiaries of the defendants, so as to form an exclusive pool (these stocks later disposed of);

(*c*) Obtaining for that corporation from a foreign local government a discriminatory tax effective to produce a monopoly;

(*d*) Organizing a single corporate selling agency in the United States, with power to fix prices and impose terms, such as—

(*e*) Requiring every American purchaser of the product to take a portion of the stored product together with the new product;

(*f*) Excluding all others from use of the only regular steamship line for the transportation of sisal from Yucatan to the markets of this country.

It seems that this states an indisputable cause of action under the Sherman and Wilson Acts.

II

THE DISTRICT COURT ERRED IN HOLDING THAT A CONSPIRACY WHOSE INTENT IS THE UNLAWFUL ONE OF EFFECTING A RESTRAINT OF TRADE AND MONOPOLY IS RENDERED IMMUNE FROM SUIT ON THE GROUND THAT A PARTICULAR ONE OF THE OVERT ACTS ON WHICH ITS SUCCESS DEPENDS WAS LAWFUL IN ITSELF

One step in the plan was to secure protective legislation from the foreign governments concerned. Upon this step defendants below concentrated their arguments and the court below rendered its decision. The view taken was that this foreign legislation was essential to the success of

the monopoly, and that therefore, upon the authority of *American Banana Company* v. *United Fruit Company*, 213 U. S. 347, the conspiracy was lawful. The reasoning was that the monopolistic intent, and the overt acts committed in furtherance of it both in Mexico and in this country, would have failed of success in the absence of such legislation. To quote from the opinion of the District Court (R. 54):

> If acts "permitted by the local law" could not be inquired into for the purpose of awarding damages to a person injured, I do not follow the reasoning which regards them as a basis for a suit by the Government to restrain the parties connected with them as conspirators. It is true enough that an act, in itself innocent, may be a step in carrying out an unlawful conspiracy, but when, as here, nothing remains of the conspiracy that is not dependent upon the claimed unlawfulness of such act the whole case must fall.

The court overlooked the difference between a conspiracy and the acts done in furtherance of the conspiracy. The entry into a conspiracy with unlawful intent to restrain foreign trade and commerce is an offense under the Sherman Antitrust Law and the antitrust provisions of the Wilson Tariff Law. The unlawful character of such a conspiracy is not "dependent" upon the unlawfulness of any one or more of the particular acts relied upon by the defendants to make such conspiracy effective. The

offense is complete when the conspiracy is entered into. (*Nash* v. *United States*, 229 U. S. 373, 378.)

The court below relied upon the following sentence in the opinion in the *Banana case*, 213 U. S. at p. 359:

> A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

The *American Banana case* was an action for damages under Section 7 of the Sherman Act, and the injury relied upon was committed at the instigation of the defendant by the Government of Costa Rica. The right to damages must depend upon the unlawful character of the injury. If the injury was lawful where committed, and therefore properly not an injury or tort at all, plaintiff could not recover damages simply because defendant had entered into an unlawful conspiracy in this country.

The sentence quoted from the *Banana case* is to the effect that a conspiracy in this country could not make acts which were lawful abroad unlawful here. It is in effect contended by appellees that the *Banana case* is authority for the proposition that the fact that such acts are lawful abroad will render the unlawful conspiracy itself lawful.

A conspiracy has often been defined to be a combination to attain an unlawful end by lawful means, or a combination to attain a lawful end by unlawful means. When a conspiracy is one to restrain foreign commerce and to monopolize the importation

of a particular product, it is unlawful irrespective of the means employed to carry it out, and is subject to be enjoined under Section 4 of the Sherman Antitrust Act and Section 74 of the Wilson Tariff Act.

In the case at bar, moreover, the Government has not merely charged the entry into a conspiracy with unlawful purpose and aim, but also the actual attainment of the ends of that conspiracy by various overt acts. Of these overt acts, the act of inducing the Government of the State of Yucatan to enact the legislation referred to in the opinion below, was but one of many. Defendants were also charged with—

> (*a*) Organizing and financing a corporation in Yucatan to be an exclusive purchaser of sisal;
>
> (*b*) Turning over to that corporation the existing stocks of sisal in the hands of the subsidiaries of the defendants, so as to form an exclusive pool;
>
> (*c*) Cutting the price for sisal in this country to so low a figure as to compel the Government and citizens of Yucatan to agree for their own protection to the discriminatory and monopolistic legislation suggested by the defendants;
>
> (*d*) Organizing a single corporate selling agency in the United States, with power to fix prices and impose terms, such as—
>
> (*e*) Requiring every American purchaser of sisal to take a portion of the stored sisal together with the new product.

(*f*) Exclusive control of regular means of transportation of sisal from Yucatan.

The District judge, in fastening his attention upon the Yucatan statute, overlooked the broader aspect of the conspiracy.

His reasoning appears to be that, without the enactment of the discriminatory legislation in Yucatan, the conspiracy would have been unsuccessful—that therefore it is "futile, so far as the public interest is concerned," to restrain it. We hardly think that this Court will announce a rule of law to the effect that when a group of conspirators plan to execute a number of overt acts, some of which are lawful in themselves, and some unlawful, the courts will leave that conspiracy untouched if it appears that it would in fact have failed in its unlawful purpose unless one of the lawful overt acts had been consummated, and that in a case in which the unlawful purpose of the conspiracy is in *actual operation* at the date of the petition.

III

THE BANANA CASE IS NOT AUTHORITY UPON THE PRESENT CASE. THE CASES WHICH FOLLOWED IT ESTABLISH THE RULE THAT EVEN ACTS DONE ABROAD WHICH ARE LAWFUL THERE MAY BE THE BASIS OF A SUIT IF THEY ARE OPERATIVE HERE AND ARE UNLAWFUL UNDER OUR LAW

There are three substantial grounds of differences between the *Banana case* and the case at bar:

(1) The *Banana case* sounded in tort for damages and the damages flowed entirely

from the act of the foreign government, while in the *Sisal case* the United States seeks equitable relief from a conspiracy which contemplated and executed restrictive and monopolistic acts in the United States, as well as abroad;

(2) The conspiracy in the *Banana case* was aimed at production only and no intent to affect, or direct effect upon, interstate commerce was shown, while in the *Sisal case* the conspiracy was aimed at restraint upon purchase, transportation, storage, and sale—every essential element of commercial traffic and intercourse;

(3) The conspiracy itself in the *Banana case*, and not the overt acts only, which caused the damage to plaintiff, was entered into in Costa Rica between the defendant company and the Costa Rican government, whereas in the *Sisal case* the alleged conspiracy entered into in Yucatan between the emissary of defendants and the Yucatan government was only incidental to the principal conspiracy between the various defendants which was entered into in the Southern District of New York.

The limitations of the doctrine of the *Banana case* are illustrated by later decisions of this Court.

United States v. *Nord Deutscher Lloyd*, 223 U. S. 512, involved an indictment under the statute forbidding a steamship company to take a charge or security for the return passage of an alien. The lower court sustained the demurrer on the ground

that the money was paid and received in Germany. In reversing the judgment, this Court held that the doctrine of the *Banana case* does not apply to acts which, though committed abroad, become operative in this country. (223 U. S. at p. 518.) Thus, in that case the act in Germany became operative in this country in that the defendant company was enabled to retain the return passage money. So in the case at bar the acts in Mexico become operative in this country in that the defendants are enabled to fix prices and control the market in sisal here.

This Court in *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87, considered the illegal effects of a combination made in the United States between carriers to monopolize certain transportation, partly within and partly without the United States, and found such combination to be within the prohibition of the Antitrust Act and also within the jurisdiction of the criminal and civil law of the United States, even if one of the parties combining be a foreign corporation.

In its opinion (page 106) this Court stated:

> In other words, it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.

United States v. *Twenty-Five Packages of Panama Hats*, 231 U. S. 358, held that although a maker of a fraudulent invoice in a foreign country be not punishable, the goods might because of that fraud be subject to forfeiture upon arrival in the United States. At page 362 of the opinion it is said:

> The very fact that the criminal provision of the statute does not operate extra-territorially against the consignor, would be a reason why the goods themselves should be subjected to forfeiture on arrival here. Cf. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356; *United States* v. *Nord Deutscher Lloyd*, 223 U. S. 512.

Similarly, the very fact that defendants in the case at bar have made use of one means beyond the territorial jurisdiction of the United States, to attain their unlawful purpose of monopolizing and controlling the market in the United States, would suggest to the courts to be alert to note the presence of the agreement and of many overt acts within the territorial limits of the United States so as to bring the conspiracy in the present case within its jurisdiction.

In *United States* v. *Bowman*, 260 U. S. 94, this Court had before it an indictment for conspiracy to defraud the United States charging that all the elements of the offense, the conspiracy as well as the overt acts, took place on the high seas or in a foreign land. At page 98 of the opinion, the Chief

Justice distinguished between "crimes against private individuals or their property" and "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself agains obstruction, or fraud wherever perpetrated." [1]

In the opinion in the *Banana case* itself, at page 357, the Court recognized this broader aspect of

[1] *American Banana Company* v. *United Fruit Company* has also been cited in the following cases in this Court. In three of the cases the decision was that the courts of this country had jurisdiction of the particular acts in issue: the other three each involved specific acts in foreign countries, having no operative effect in the United States. The names of the cases, the points for which the *Banana case* was cited, and the decisions follow:

The Titanic, 233 U. S. 718, 732; cited to the effect that the Act of Congress governing limitation of liability does not control the conduct of a British ship in the high seas; decision that where parties of various nationalities are before the court, or the law of the ship's nationality is shown to be similar to that of this country, the American rule will be applied.

Ricaud v. *American Metal Company*, 246 U. S. 304, 309; cited to the effect that "the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory"; decision upholding the title to property which had been condemned and sold by the recognized Mexican government.

Sandberg v. *McDonald*, 248 U. S. 185, 195; cited to the effect that "legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction"; decision that Seaman's Act did not extend to payments of advance wages to alien seamen shipping abroad on a foreign vessel.

Grogan v. *Walker & Sons*, 259 U. S. 80, 93; cited in dissenting opinion to the effect that "it is certainly the first

the Sherman Act by confining its decision to the facts there at issue:

> We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute *so far as the present suit is concerned.* (Italics ours.)

Assume, for purposes of argument, however, that neither the Sherman Act nor even the Wilson Act are to have any extraterritorial operation, and that the *Banana case* is to be put upon the very broad ground that the courts of the United States must recognize as legal whatever is done solely in foreign countries in restraint of the flow of commerce into the United States, at least until Congress has expressly spoken to the contrary. It remains undisputed that conspiracies within the United States and overt acts in pursuance thereof within the United States give our courts jurisdiction.

In the case of *United States* v. *American Tobacco Company,* 221 U. S. 106, this Court in substance held that contracts entered into in England, be-

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sense of every law that its field of operation is the country of its enactment"; decision that National Prohibition Act covers the transshipment in bond of whisky consigned through New York from Canada to Mexico.

Cunard S. S. Company v. *Mellon,* 262 U. S. 100, 123; cited to the effect that the jurisdiction over a domestic ship on the high seas arises out of the nationality of the ship and not for a territorial reason; decision that the National Prohibition Act is territorial in operation.

New York Central Railroad Company v. *Chisholm,* 268 U. S. 29, 32; cited generally; decision that Employers' Liability Act does not extend to accident in Canada.

tween an American corporation and a British corporation, but having the effect of restraining the commerce of the United States, were violative of the Sherman Act.

The acts done in Yucatan were but a single element of the case at bar. The defendant banks, and their officers and accomplices in New York, were not content to invoke the aid of the foreign government. If we assume that would be legal, we have merely dipped into the charges of this petition.

They further set up in Yucatan a private purchasing corporation with a monopolistic purpose. Their acts in Yucatan were thus not confined to use of the instrumentality of government. But more, their acts were not confined to Yucatan.

In the United States, to induce the foreign government to accede to their demands, they resorted to abnormal price cutting as a threat to the citizens and state of Yucatan and a means to monopoly.

In the United States they organized a monopolistic sales corporation and obtained for it an exclusive agency contract with the foreign purchasing corporation. Through this agency they raised prices to the American consumer.

They turned over to the foreign corporation stores of sisal in existence both in this country and in Yucatan.

They made an exclusive contract with the only steamship corporation regularly plying between Yucatan and New York.

And in the United States they had met and entered into the contract, combination, or conspiracy of which all these acts were but the means to the end of monopoly.

The conspiracy had three principal elements, i. e., American financial support, a monopolistic buying agency in Mexico, and a monopolistic selling agency in America. Discriminatory legislation barred all but the Exportadora from the Mexican market, but even it, with that aid, could not have been an efficient monopolizer there without the American money advanced by the Sisal Sales Corporation, the American monopolistic distributor.

IV

THE ANTITRUST PROVISIONS OF THE WILSON TARIFF ACT ARE PARTICULARLY DIRECTED AGAINST RESTRAINTS UPON FOREIGN COMMERCE BY IMPORTERS

The Wilson Act was not referred to in the pleadings, briefs, or opinions in the *Banana case,* October Term, 1908, No. 686. Nor has it been construed in any case that has come to our attention. Some may doubt whether its scope goes beyond that of the Sherman Law, but whether or not this be the case, its applicability to the present case is clear. It refers not merely to—

> Every contract, combination * * *, or conspiracy in restraint of trade or commerce (Sherman Act, sec, 1, 26 Stat. 209),

but to—

> Every contract * * * between two or more persons or coporations either of whom, as agent or principal, is engaged in *importing* any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles *imported or intended to be imported* into the United States, or of any manufacture into which such imported article enters or is intended to enter (Wilson Tariff Act, sec. 73, 28 Stat. 570; 37 Stat. 667),

and not merely to—

> Every person who shall make any such contract or engage in any such combination or conspiracy (Sherman Act, sec. 1, 26 Stat. 209),

but to—

> Every person who is or shall hereafter be engaged in the *importation* of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same. (Wilson Tariff Act, sec. 73, 28 Stat. 570; 37 Stat. 667.)

In 31 Opinions of the Attorney General, 545, 552, is found an interesting construction of the statute. Attorney General Wickersham held that although

a combination of German potash growers protected by German law does not in itself violate the Act, its corporate representative in this country is acting unlawfully:

> It is unnecessary to say that a law enacted by the German Government can not, in itself, constitute a combination within the meaning of this Act. Whatever the conditions may have been that prompted its passage, or the influences that conspired to bring it about, yet upon the passage of the law it became an act of the German Government and can not in any sense be considered a combination. But the statute of the German Empire can not protect citizens of that country, still less American citizens, from the consequences of acts done within the jurisdiction of the United States in violation of *its* laws. The agreement or contract entered into in Germany between the various potash owners, so far as its provisions are the same as the provisions of the German law, does not of itself constitute an unlawful combination within the provisions of our law. But any acts done within our jurisdiction must be judged by our law. * * * (552, 553).
>
> * * * It is an unquestioned fact that a very large quantity of potash is imported into the United States; but are these importations made by persons or parties, any one of whom has entered into this or another unlawful combination? The facts submitted to me do not clearly show the relationship

between the American corporation, known as the German Kali Works, and the foreign syndicate created by this agreement, but they do show that one of two relationships must exist. Either the American corporation is a selling agent of the syndicate, which is composed of the mine owners, and the potash when shipped is consigned to it as such agent, or this corporation is a purchaser of the goods from the syndicate, and as such purchaser has agreed to handle the entire supply from the mines which are embraced in the syndicate at the prices fixed by this combination, and in accordance with its provisions, and has thereby either become a party to the agreement or has entered into an independent agreement of the same character. In either event, I think the statute would apply, because, in the first instance, the importer would be the German syndicate, or rather the various mine owners who under the combination have made the syndicate their agent, and, in the second instance, the American corporation would be the importer, which by its contract has become a party to this or another unlawful combination (554).

V

REPEAL BY THE STATE OF YUCATAN OF THE DISCRIMINATORY LEGISLATION IN FAVOR OF DEFENDANTS' MONOPOLY WOULD NOT RENDER THE CASE MOOT

It has been suggested to the Government that in fact the legislation in Mexico has changed so as to deprive these defendants of continued success in

their conspiracy to monopolize. It might therefore be suggested that the present case is moot.

Assuming that the facts are that the discriminatory legislation in Mexico has since been repealed, in that the effect thereof has been to render the conspiracy of the defendants at the present time ineffective, it does not follow that the case is moot. As already pointed out, the theory of this petition is three-fold:

> (1) That a conspiracy was entered into in the United States for the purpose of monopolizing the foreign commerce in sisal in the United States;
>
> (2) That certain acts were planned to be done, and were done in the United States in furtherance thereof, and certain conditions and factors (such as the Sisal Sales Corporation) were created and continued in existence to the filing of the petition;
>
> (3) That certain other acts were planned to be done, and were done in Mexico, in furtherance thereof.

One of the acts under the third heading was to induce the Government of the State of Yucatan to enact discriminatory legislation in favor of a corporation to be set up and controlled by these defendants. Assume that that purpose, though at first successful, has now failed, due to the action of the Government of Mexico. The gist of the offense here charged, the conspiracy with unlawful intent in the United States, must be presumed to continue.

If such conspiracy has not continued, but has in fact been abandoned by the parties since the filing of the petition, the Government is still entitled to a decree in equity against the parties. (*United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290.)

The rule applied by this Court in determining whether a suit to enjoin a conspiracy under the Antitrust laws has become moot is illustrated by comparison of the *Trans-Missouri* case with the case of *United States* v. *Hamburg-American Company,* 239 U. S. 466. (Followed in *United States* v. *American-Asiatic Steamship Company,* 242 U. S. 537.)

In the *Trans-Missouri case,* it appeared that after judgment entered below, defendants had dissolved the association set up by them in pursuance of, and as a means to the attainment of the ends of the conspiracy charged. It was held that by their voluntary act the defendants could not deprive the courts of jurisdiction to enter an effective decree against future violations of the law. (166 U. S. at p. 309.)

In the *Hamburg-American case,* on the other hand, the question as to whether the case had become moot arose, not as a result of action by the defendants but as a result of the European War, of which this Court took judicial notice. In the opinion of Mr. Chief Justice White, 239 U. S. at pp. 476, 477, the question is considered at length, and the conclusion reached that if the alleged moot

character of the suit is the result of action by defendants, the Court will retain jurisdiction (p. 477):

> "But if the intervening event is owing to the plaintiff's own act, or to a power beyond the control of either party, the court will stay its hand."

In the present case the intervening act now under consideration is owing to a power beyond the control of either party. Although that act is not one of which the Court will take judicial notice, as in the *Hamburg-American case*, but is the act of a foreign government which must be the subject of an answer and proof, we deem it our duty to call it to the attention of this Court. However, it does not follow that the case becomes moot.

The intervening legislation in Yucatan would not, as did the World War in the *Hamburg-American case*, render the conspiracy wholly ineffective.

The conspiracy involved a purpose, and embraced many elements, which can not be affected by acts of the legislatures of Mexico or Yucatan.

Indeed, the error upon which an argument that this case is moot would have to be premised is the same error into which the court below was led in considering the merits—the error of placing the exclusive emphasis on the legislation of Yucatan. This is not a suit to enjoin the legislation of Yucatan or to deprive a particular group of American citizens of its benefits. This is a suit to enjoin

an alleged conspiracy to destroy the free competitive market in sisal in the United States and to substitute a monopoly, based in part on foreign legislation and in part on the many other measures set forth in the original bill.

Respectfully submitted.

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